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No. 04-698

# In the Supreme Court of the United States

BRIAN SCHAFFER, A MINOR, BY HIS PARENTS AND NEXT FRIENDS, JOCELYN AND MARTIN SCHAFFER, ET AL., PETITIONERS

*v.*

JERRY WEAST, SUPERINTENDENT, MONTGOMERY COUNTY PUBLIC SCHOOLS, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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## QUESTION PRESENTED

Whether, under the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*, when parents initiate an administrative "due process" hearing to seek reimbursement for private-school tuition and challenge their child's individualized education program, the burden of proof falls on the parents or the school district.

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

### INTEREST OF THE UNITED STATES

This case concerns the allocation of the burden of proof in administrative "due process hearings" under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, in which parents challenge the adequacy of a school district's proposed individualized education program (IEP) and seek reimbursement for private-school tuition. The Department of Education administers the IDEA, and has authority to promulgate regulations necessary to ensure compliance with the Act. See 20 U.S.C. 1417. In addition, to obtain financial assistance under the IDEA, a State must satisfy the Secretary of Education that it "has in effect policies and procedures to ensure that it meets" the Act's requirements, including those relating to administrative due process hearings. See 20 U.S.C. 1412(a). Accordingly, the United States has a significant interest in the proper resolution of the question presented.

### STATEMENT

1. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, establishes a cooperative program under which the federal government makes grants to participating States to assist them in providing public education to children with disabilities. See generally 20 U.S.C. 1400(d).[1] Maryland participates in the IDEA program, and its public school districts and officials must comply with the Act's requirements in the administration of the program within the State.

[1] On December 3, 2004, Congress amended the IDEA; however, the amendments do not take effect until July 1, 2005. See Pub. L. No. 108-446, 118 Stat. 2646. Unless otherwise indicated, citations are to the statute as it existed prior to the 2004 Amendments. A copy of the amended provisions is attached to petitioners' brief.

a. Under the IDEA, a State participating in the grant program must ensure that each disabled child receives a "free appropriate public education," which includes special-education services necessary to meet the child's particular needs. 20 U.S.C. 1400(d)(1)(A), 1412(a)(1)(A). The Act requires local school systems to develop an individualized education program (IEP) for each disabled child in accordance with statutory requirements. See 20 U.S.C. 1412(a)(4). The IEP is developed by an "IEP team," which consists of representatives of the local school system (including the child's teacher and a special education teacher), the child's parents, and, where appropriate, the child. 20 U.S.C. 1414(d)(1)(B).

The IDEA further requires state educational agencies receiving federal funds to "establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies." 20 U.S.C. 1415(a). Although the Act grants States substantial discretion over the precise contours of the procedural safeguards to be provided, it mandates a number of specific safeguards that States must include in those procedures. Those procedures, for example, must provide "an opportunity to present complaints [to the state or local educational agency] with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. 1415(b)(6). The parents' complaint must contain, *inter alia*, "a description of the nature of the problem of the child relating to [the IEP], including facts relating to such problem," and "a proposed resolution of the problem to the extent known and available to the parents at the time." 20 U.S.C. 1415(b)(7)(B)(ii) and (iii).

When such a complaint is filed, "the parents involved * * * shall have an opportunity for an impartial due process hearing." 20 U.S.C. 1415(f)(1). At any such hearing, *both* the school and the parents must be accorded certain rights, including "the right to be accompanied and advised by counsel



and by individuals with special knowledge or training with respect to the problems of children with disabilities"; "the right to present evidence and confront, cross-examine, and compel the attendance of witnesses"; "the right to a written, or, at the option of the parents, electronic verbatim record of such hearing"; and "the right to written, or, at the option of the parents, electronic findings of fact and decisions." 20 U.S.C. 1415(h)(1)-(4). The statute does not specify whether the burden of proof at the hearing falls upon the parents or the school system.

If a State elects to have the local educational agency conduct the hearing, any aggrieved party can appeal the decision to the State educational agency. 20 U.S.C. 1415(g). A party aggrieved by a decision at the final State administrative stage has a right to "bring a civil action with respect to the complaint" in federal district court or "any State court of competent jurisdiction." 20 U.S.C. 1415(i)(2)(A). Congress specified that courts should decide such cases based on "the preponderance of the evidence," but did not specify which party bears the burden of proof in state or federal court. 20 U.S.C. 1415(i)(2)(B)(iii).

b. In 2004, Congress reauthorized and amended the IDEA, in substantial part to coordinate the Act's requirements with the substantial reform and accountability measures adopted in the No Child Left Behind Act of 2001 (NCLB), 20 U.S.C. 6301, *et seq.*; see Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), Pub. L. No. 108-446 (effective July 1, 2005). The NCLB is a comprehensive education reform law designed to ensure that a high-quality education program is provided to all students in public elementary and secondary schools, including students with disabilities. It requires States to adopt challenging academic content and achievement standards for all students in public schools, 20 U.S.C. 6311(b)(1); carry out annual assessments aligned to those academic standards to measure the progress of all students, including those with disabilities, 20 U.S.C. 6311(b)(3); and develop a single, statewide ac-

countability system that holds all local educational agencies and public schools accountable for making "adequate yearly progress" in achieving the State's academic standards—including performance with regard to students with disabilities, 20 U.S.C. 6311(b)(2).

The 2004 IDEA Amendments reinforce the accountability provisions of NCLB by, *inter alia*, requiring that States establish "goals for the performance of children with disabilities" that "are the same as the State's definition of adequate yearly progress, including the State's objectives for progress by children with disabilities," 20 U.S.C. 1412(a)(15)(A)(ii), and requiring that all "children with disabilities are included in all general State and districtwide assessment programs, including the assessments" required by the NCLB, 20 U.S.C. 1412(a)(16)(A). Moreover, the IDEA Amendments expressly incorporate the NCLB's standards for measuring the educational progress of children with disabilities and require that each State "establish[] goals for the performance of children with disabilities" that are "the same as the State's definition of adequate yearly progress" under the NCLB. 20 U.S.C. 1412(a)(15). And Section 1412(a)(15)(B) of the IDEA as amended now requires States to establish "performance indicators" to use towards measuring the progress towards achieving those goals, "including measurable annual objectives for progress by children with disabilities under [the NCLB]." *Ibid.*

These amendments "carefully align[] the IDEA with the accountability system established under NCLB to ensure that there is one unified system of accountability for States, local educational agencies and schools." S. Rep. No. 185, 108th Cong., 1st Sess. 17-18 (2003). Consistent with that stated goal, the 2004 IDEA Amendments also reaffirm and buttress the notice pleading approach to due process hearings under the IDEA, expressly limit the scope of the hearing to those issues raised in the complaint, impose a limitations period for filing a complaint, and seek to encourage co-



operation and reduce litigation over the contents of an IEP. See Part I.B., *infra*.

2. a. Petitioners Brian Schaffer and his parents filed this action under the IDEA against the Montgomery County Board of Education and its Superintendent, alleging that the school system's IEP failed to provide him with a "free appropriate public education" as required under the Act. Brian, who has Attention Deficit Hyperactivity Disorder and other learning disabilities, attended private school until seventh grade, when school personnel informed him that he needed to attend a school that could better accommodate his disabilities. Pet. App. 3.

At his parents' request, Montgomery County Public Schools (MCPS) evaluated Brian, determined that he was eligible for special education, and offered his parents a proposed IEP for the next school year. Pet. App. 3-4. After Brian's parents objected to the class size at the local middle school, MCPS offered to provide the same IEP services at a different middle school, which was ten minutes from Brian's home and which had smaller classes. *Id.* at 4. Brian's parents believed that the IEP was still inadequate and decided to send Brian to private school. The parents also requested a due process hearing under the IDEA and sought to require MCPS to pay for their son's private school tuition. *Ibid.*

b. Under Maryland law, due process hearings are conducted by administrative law judges (ALJs). Pet. App. 4. At the hearing, the ALJ held that the parents bore the burden of proving that the IEP failed to provide their son a "free appropriate public education"; that the parents failed to satisfy that burden; and that "'the assignment of the burden of proof [was] critical' to the outcome." *Id.* at 4-5.

The parents then filed suit in federal court. The district court concluded that the IDEA mandates that schools bear the burden of proof regardless of which party initiates the due process hearing and remanded the case to the ALJ for further proceedings. Pet. App. 5. The MCPS appealed, but while the appeal was pending, the ALJ on remand reas-

signed the burden of proof to the school system and found that MCPS had failed to prove that its IEP was adequate. *Ibid.* The court of appeals then vacated the district court's original decision and "remand[ed] to that court with directions that any issue with respect to the proof scheme in this case be consolidated with consideration of the merits." *Id.* at 5-6. In accordance with that order, the district court reaffirmed its previous holding that the school system had the burden of proof, and held on the merits that the proposed IEP was inadequate.[2]

3. A divided panel of the Fourth Circuit reversed. Noting that the IDEA does not expressly assign the burden of proof at the administrative hearing, the court held that where a "statute is silent, the burden of proof is normally allocated to the party initiating the proceeding and seeking relief." Pet. App. 6. That rule applies to numerous other federal remedial statutes such as Title VII, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA), which are similarly silent with respect to the assignment of the burden of proof, and the court found no legitimate basis for distinguishing the IDEA from these other remedial statutes. *Id.* at 8.

The court rejected the parents' argument that the burden of proof should fall on the school system because of its

[2] In August 2000, the United States filed an amicus brief in the Fourth Circuit in support of the parents' position that the burden of proof should fall on the school system. The United States did not participate in any further proceedings in the case, including the 2004 proceedings before the court of appeals that resulted in the opinion that is currently before this Court. In determining eligibility for funds, the Secretary has not reviewed whether States placed the burden of proof on the party, including parents, seeking relief at the hearing. See 20 U.S.C. 1412(a)(6). After careful review of its administrative practice, the relevant case law, and the text, structure and history of the IDEA, including the 2004 Amendments to the Act, the government is now of the view that, where, as here, a State has not placed the burden of proof on school districts as a matter of state law, the traditional rule that the burden of proof falls on the party seeking relief applies to IDEA due process hearings.



greater expertise and resources, observing that the "side with the bigger guns" does not automatically bear the burden of proof, and that "very often a party must plead and prove matters as to which his adversary has superior access to the proof." Pet. App. 9 (quoting 2 John W. Strong, *McCormick on Evidence* § 337 (5th ed. 1999)). Congress recognized that a school system would have certain advantages in disputes over a child's education, and accordingly implemented numerous procedural safeguards in the IDEA to ensure parents' ability to participate meaningfully in the process of developing an IEP. *Id.* at 10. As a result of these safeguards, the court explained, the "school system has no unfair information or resource advantage that compels us to reassign the burden of proof." *Id.* at 11-12.

The court also reasoned that assigning the burden of proof to the school system would contradict "a basic policy of the IDEA, which is to rely upon the professional expertise of local educators." Pet. App. 14. And although Congress provided extensive procedural safeguards to ensure meaningful parental involvement, "assignment of the burden of proof * * * was not one of them." *Id.* at 16. The court therefore held that the parents have the burden of proof when they challenge the adequacy of an IEP in administrative proceedings under the IDEA.

Judge Luttig dissented. Pet. App. 16-20. He reasoned that the school system not only has greater resources than the parents, but also "has better access to information, greater expertise, and an affirmative obligation to provide the contested services," and that the "collective weight" of these factors favored allocating the burden of proof to the school. *Id.* at 20.

## SUMMARY OF ARGUMENT

Traditional rules governing the allocation of the burden of proof, the interpretation of Spending Clause legislation, and the text, structure, and purposes of the IDEA support placing the burden of proof on the party that initiates and seeks

relief at the administrative due process hearing under the Act. Here, that party is the parents, who initiated and sought relief at the hearing and who alleged that school officials failed to comply with their legal obligations in formulating the IEP.

a. Two well established legal rules support placing the burden of proof on the parents in this case. The first is that, absent a contrary indication of legislative intent, the "traditional rule" applies and requires that the party seeking relief bears the burden of persuasion. Pet. App. 6 (citing, *inter alia*, 2 John W. Strong, *McCormick On Evidence* § 337, at 412 (5th ed. 1999)). That traditional allocation of the burden of proof applies to numerous analogous remedial statutes—such as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and Section 504 of the Rehabilitation Act—as well as to claims in administrative hearings by benefits claimants under any number of important federal programs governed by the Administrative Procedure Act (APA). The second is that public officials, including public school officials, are presumed to act in good faith compliance with their legal obligations. Thus, where, as here, a party alleges that those officials violated their legal duties, the complaining party generally bears the burden of proof.

b. In addition, unless state law provides for a different result, longstanding principles governing Spending Clause legislation, such as the IDEA, support applying the traditional rule in this context. Neither the statute nor the agency, either by regulation or administrative practice, has conditioned the receipt of federal funds on the adoption by States of a modification to the traditional allocation of the burden of proof. There is no basis to read into this legislative and administrative silence a requirement that States alter their rules so that schools at all times bear the burden of persuasion. At the same time, there is nothing prohibiting a State receiving funds under the Act from going beyond the



statutory baseline and imposing the burden of proof on schools as a matter of *state* law.

c. While the IDEA does not specifically address the issue, several aspects of the statute support placing the burden of proof where it presumptively lies—on the party initiating and seeking relief at the administrative hearing. The Act, for example, establishes a traditional pleading regime similar to those common in civil and administrative litigation, under which the complaining party must identify its affirmative case and request particular relief. Such a pleading regime strongly suggests that Congress intended the traditional allocation of the burden of proof to apply. See 2 John W. Strong, *McCormick on Evidence* § 337, at 411 (5th ed. 1999). The Act's general deference to the decisions of educational professionals, its presumption in favor of the child's status quo educational placement, and the amendments to the Act adopted in 2004 to limit litigation and encourage cooperation with respect to the adoption and implementation of IEPs, all support this conclusion.

d. Finally, petitioners' policy arguments do not support deviating from the traditional allocation of the burden of proof in IDEA administrative hearings. As this Court noted in both *Board of Education* v. *Rowley*, 458 U.S. 176, 206-207 (1982), and *School Committee of Burlington* v. *Department of Education*, 471 U.S. 359, 368 (1985), Congress addressed policy concerns through the IDEA's *procedural* safeguards, and, accordingly, it would be inappropriate to impose a substantive standard of review not found in the Act based on such concerns. Moreover, none of petitioners' policy arguments distinguishes the IDEA from the numerous other remedial statutes and administrative contexts in which the traditional allocation of the burden of proof undisputedly applies.

## ARGUMENT

### THE IDEA SHOULD BE READ TO PLACE THE BURDEN OF PROOF ON THE PARTY INITIATING AND SEEKING RELIEF AT AN ADMINISTRATIVE HEARING UNDER THE ACT

The question presented in this case—whether the parents or the school district bears the burden of proof when the parents initiate an administrative "due process" hearing to challenge a school's individual education plan, or IEP, pursuant to Section 1415(f) of the IDEA—is a narrow one that should affect only a small number of cases under the IDEA. As this Court noted of a similar burden of proof question in *Director* v. *Greenwich Collieries*, 512 U.S. 267 (1994), "burden of proof" in this context refers to the "burden of persuasion—the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose." *Id.* at 272.

The number of cases truly in equipoise is unlikely to be particularly large. Moreover, because there are no provisions for motions for summary judgment at the administrative level, both parties will always have a fair and equal chance to present their best case to the trier of fact. Accordingly, regardless of which party bears the burden of proof, both the parents and the school have ample incentive to develop and present their best evidence, including submissions from medical and educational experts. See *Board of Educ.* v. *Rowley*, 458 U.S. 176, 209 (1982) ("[P]arents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act."). Nevertheless, the question is important, in part, because in order to continue to receive funding under the IDEA, States must satisfy the Secretary that their policies and procedures, including those for due process hearings, meet the Act's requirements. See 20 U.S.C. 1412(a)(6).

For the reasons set forth herein, traditional rules governing placement of the burden of proof and the text, structure, and purposes of the IDEA support placing the burden of proof on the party that initiates and seeks relief at the administrative due process hearing. When the school is the complainant at the administrative hearing, it should bear the burden of proof. But where, as here, parents initiate the hearing, seek relief, and allege that school officials failed to comply with their legal obligations in formulating the IEP, that burden should rest with the parents.



#### A. Both The Traditional Rule That The Party Seeking Relief Bears The Burden Of Proof And The Presumption Of Regularity That Attaches To Actions Of Public Officials Support Placing The Burden On The Party Seeking Relief Under The IDEA

1. Under the IDEA, Congress set forth "elaborate and highly specific procedural safeguards" to ensure that parents can participate meaningfully in the development of IEPs and that they have access to administrative and judicial review when they believe a school system's proposed IEP is inadequate. See *Rowley*, 458 U.S. at 205. Congress further charged state educational agencies with the responsibility for adopting additional "procedural safeguards" consistent with those set forth in the Act to ensure that children with disabilities receive a free appropriate public education. 20 U.S.C. 1415(a). Congress has not, however, specified who bears the burden of proof in an administrative due process hearing under the Act. See Pet. App. 6.

As the majority below correctly recognized, where, as here, Congress is silent on the issue, the starting point in determining the allocation of the burden of proof is the "traditional rule" that the party seeking relief bears the burden of persuasion. Pet. App. 6 (citing, *inter alia*, 2 John W. Strong, *McCormick On Evidence* § 337, at 412 (5th ed. 1999)); see generally 29 Am. Jur. 2d Evidence § 158 (1994) ("Typically, the plaintiff has the burden of pleading and proving every essential fact and element of his cause of action."); 21 Charles W. Wright & Kenneth W. Grahm, Jr.,

*Federal Practice & Procedure Evidence* § 5122, at 555-556 (1977) ("[T]he usual rule is that the burden of proof is on the plaintiff."); 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 63, at 314 (2d ed. 1994) ("Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request, which means that the plaintiffs bear the burden on the elements of their claims."). See, *e.g.*, *Bull* v. *United States*, 295 U.S. 247, 260 (1935) (holding "burden of proof" is "normally on the claimant"); *Arthur* v. *Unkart*, 96 U.S. 118, 122 (1877) ("The burden of proof is upon the party holding the affirmative of the issue.").

This traditional rule generally applies even to remedial anti-discrimination statutes such as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and the Rehabilitation Act. See, *e.g.*, *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 511 (1993) (despite shifting burdens of production, "Title VII plaintiff at all times bears the ultimate burden of persuasion"); *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (1993) (ADEA); *Dvorak* v. *Mostardi Platt Assoc.*, 289 F.3d 479, 485 (7th Cir. 2002) (ADA); *Williams* v. *Widnall*, 79 F.3d 1003, 1005 & n.3 (10th Cir. 1996) (Section 504 of the Rehabilitation Act).[3]

The traditional rule that the party initiating the proceedings and seeking relief bears the burden of persuasion also expressly applies to federal administrative agency proceedings under the APA, 5 U.S.C. 556(d), in which the benefit

[3] Some questions have arisen under the ADA and Section 504 of the Rehabilitation Act as to whether certain issues are in fact affirmative defenses (and therefore impose a burden of proof on the party asserting the defense). See *Borkowski* v. *Valley Cent. Sch. Dist.*, 63 F.3d 131, 137-138 (2d Cir. 1995) (undue hardship); *Branham* v. *Snow*, 392 F.3d 896, 906-907 (7th Cir. 2004) (direct threat); but cf. *Barth* v. *Gelb*, 2 F.3d 1180, 1186 (D.C. Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994). Here, however, the IDEA specifies the requirements for the contents of the parents' complaint, and there is no suggestion that any aspect of the complaint could properly be considered an affirmative defense.



claimant generally bears the burden of persuasion. See *Director* v. *Greenwich Collieries*, 512 U.S. 267, 271 (1994) (holding that APA requires burden of persuasion as well as production be placed on benefit claimant initiating administrative hearing). Thus, as this Court held in *Greenwich Collieries*, 512 U.S. at 281, even in the face of a contrary administrative rule, in any administrative hearing covered by the APA, the traditional rule requires that "when the evidence is evenly balanced, the benefits claimant must lose."

Congress, of course, is presumed to have understood such well settled legal principles at the time it enacted the IDEA. See *Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988). Neither the text nor history of the IDEA suggests that Congress intended to deviate from the presumption that the burden lies on the party seeking relief. Rather, as discussed in Part I.B., *infra*, several features of the Act indicate that Congress intended the same burden of proof to apply to administrative hearings under the IDEA as applies to claims under similar civil rights statutes and to administrative hearings initiated by claimants for a variety of important federal benefits under the APA. But even aside from those indications of congressional intent, the lack of *any* expression by Congress of an intent to deviate from the traditional allocation of the burden of proof in IDEA administrative hearings is itself sufficient to conclude that the burden of persuasion rests on the party initiating the hearing and requesting relief.

That is particularly true in light of the fact that Congress knows how to depart from the traditional rule when it so desires. See, *e.g.*, 38 U.S.C. 5107 (providing that a claimant for veteran's benefits must "present and support a claim for benefits," but that "[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant"); 8 U.S.C. 1186b(c)(3)(D) (placing burden of proof on Attorney General in proceeding initiated by alien challenging termination of

permanent resident status); 25 U.S.C. 450j-1(l) (assigning burden of proof to agency in hearings challenging agency's withholding of funds owed to Indian tribe under self-determination contract).

2. The conclusion that the traditional allocation of the burden of proof applies to administrative hearings under the IDEA is further supported by a second, equally settled legal principle: the presumption of administrative regularity afforded to government conduct. This Court has repeatedly held that "in the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties." *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States* v. *Chemical Found. Inc.*, 272 U.S. 1, 14-15 (1926)); accord *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 174 (2004); *United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 10 (2001); *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983). As this Court explained in *Armstrong*, the presumption of regularity "rests in part on an assessment of the relative competence" of administrators and courts, as well as on important separation-of-powers concerns. 517 U.S. at 465.

This Court has long recognized that, absent a contrary legislative indication, the presumption of regularity supports placing the burden of proof on the party alleging that public officials failed to comply with their legal obligations. In *Sunday Lake Iron Co.* v. *Township of Wakefield*, 247 U.S. 350, 352 (1918), for example, this Court considered an equal protection claim under the Fourteenth Amendment to a state board of tax assessors' assessment of property. Of particular relevance to the present case, the Court unanimously declared that "[t]he good faith of such officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party." *Id.* at 353.

The good faith of public school officials and the validity of their actions are equally subject to the presumption of regularity. See, *e.g.*, *Rowley*, 458 U.S. at 206 (noting that IDEA



"is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review"); *Mitchell* v. *Helms*, 530 U.S. 793, 863-864 (2000) (O'Connor, J., concurring) ("[I]t is entirely proper to presume that * * * school officials will act in good faith."); *Goss* v. *Lopez*, 419 U.S. 565, 578 (1975) ("By and large, public education in our Nation is committed to the control of state and local authorities.") (quotation omitted); see also *Agostini* v. *Felton*, 521 U.S. 203, 223-224 (1997). As with the challenge to the tax assessment in *Sunday Lake Iron Co.*, it necessarily follows from that presumption of regularity that "the burden of proof is upon the complaining party" challenging the actions of public officials—in this instance, the parents, who initiated the due process hearing by alleging in their complaint that school officials failed to comply with their obligations under the IDEA.[4]

The IDEA recognizes this presumption of regularity and entrusts important functions to state and local educational professionals to ensure that children with disabilities are identified and receive a free and appropriate public education. As this Court explained in *Rowley*, "[t]he primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the

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[4] In other contexts where this Court has recognized a presumption of regularity, it has always placed the burden of proof on the party alleging that public officials acted inconsistent with that presumption. See, *e.g.*, *Parke* v. *Raley*, 506 U.S. 20, 29 (1992) (holding that placing burden on government of proving validity of even an uninformed guilty plea challenged on collateral attack "would * * * improperly ignore another presumption deeply rooted in our jurisprudence: the 'presumption of regularity' that attaches to final judgments, even when the question is waiver of constitutional rights") (citing *Johnson* v. *Zerbst*, 304 U.S. 458, 468-469 (1938)); *United States* v. *R. Enters.*, 498 U.S. 292, 305 (1991) (explaining that placing burden on subpoenaed witness of establishing that compliance with subpoena would be unreasonable or oppressive "accords * * * with the presumption of regularity that attaches to grand jury proceedings").

parents or guardian of the child." 458 U.S. at 207; see *id.* at 208 (concluding that Congress shared the view "that courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy,'" and that, accordingly, "Congress's intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped"). Assignment of the burden of proof to parents or other parties who challenge the validity of an IEP would best reflect Congress's intent to rely primarily on the professional judgment and experience of state and local educators. As the court below recognized, to hold otherwise and "say that the schools system should lose [if no evidence is presented] is to say that every challenged IEP is presumptively inadequate." Pet. App. 14. Such a presumption of *ir*regularity finds no support in the text or history of the IDEA.[5]

### B. Principles Governing Spending Clause Legislation Also Support Applying The Traditional Rule For Allocating The Burden Of Proof, Absent Contrary State Law

This Court should be particularly reluctant to find any implicit congressional intent to override the traditional allocation of the burden of proof and the presumption of regularity in this context, because the IDEA is Spending Clause legislation that conditions federal financial assistance on compliance with the Act's requirements. See *Rowley*, 458 U.S. at 190 n.11 & 204 n.26; *Cedar Rapids Comm. Sch. Dist.* v. *Garrett F.*, 526 U.S. 66, 83 (1999) (Thomas, J., joined by Kennedy, J., dissenting) ("[b]ecause IDEA was enacted pursuant to Congress' spending power, our analysis of the statute in this case is governed by special rules of construction"). Given this Court's repeated admonition that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously," *Barnes* v. *Gorman*, 536 U.S. 181, 186 (2002) (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)), it would be anomalous to hold that, in the face of legislative and regulatory silence, the IDEA, through its silence, conditions federal funds on the requirement that States modify their rules and shift the burden of proof in all instances onto their schools.

Neither Congress, nor the Department of Education in applicable regulations, has required States to impose the burden of proof on their local school districts when parents challenge IEPs, and the Department of Education has not reviewed the placement of the burden of proof in determining eligibility for funds. Courts should therefore refrain from imposing a requirement on the States that they modify their rules to provide that the school district always bears the burden of proof. Thus, where, as here, state law does not specifically allocate the burden of proof in IDEA proceedings, the court of appeals correctly held that the traditional rule that the party seeking relief bears the burden of proof informs the federal statutory baseline. At the same time, however, nothing in the Act or applicable regulations prevents a State from going beyond what the IDEA requires and imposing a burden of proof on its school systems in administrative hearings.[6] Indeed, courts have held that as a

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[5] Petitioners' reliance on *Keyes* v. *School District No. 1*, 413 U.S. 189, 208 (1973), and its analogy to circumstances in which "school authorities have been found to have practiced purposeful segregation in part of a school system" is misplaced. An IDEA administrative complaint involves only an *allegation* that school officials have violated their legal obligations, not a judicial determination that they have done so. A presumption that schools should be treated with the same skepticism as an adjudicated violator is unwarranted and inconsistent both with the plain terms of the Act, which entrust numerous important responsibilities to state and local educational institutions, and with this Court's decisions in *Rowley*, 458 U.S. at 206-207, and *School Committee of Burlington* v. *Department of Education*, 471 U.S. 359, 368 (1985), which make clear that Congress extended substantial deference to the educational determinations of school officials.

[6] A number of States have adopted rules altering the traditional burden of proof in administrative hearings under the Act. See, *e.g.*, Ala. Admin. Code r. 290-8-9.08(8)(c)(6) (2001); Alaska Admin. Code tit. 4,

matter of state law, States can impose both substantive and procedural requirements that are more protective of disabled children and their parents than those imposed by the IDEA, so long as such requirements do not conflict with the IDEA. See, *e.g.*, *Kathleen H.* v. *Department of Educ.*, 154 F.3d 8, 10 (1st Cir. 1998); *In re Conklin*, 946 F.2d 306, 308-309 & n.2 (4th Cir. 1991).

### C. The IDEA's Text And Structure Support Placing The Burden On The Party Seeking Relief At The Due Process Hearing

Although the IDEA does not speak directly to which party bears the burden of proof at an administrative due process hearing, several features of the Act strongly support placing the burden on the party seeking relief at the hearing.

1. Section 1415 of the IDEA establishes a traditional pleading regime similar to those common in civil and administrative litigation, under which the complaining party must identify its affirmative case and request particular relief. Indeed, before the 2004 Amendments, under the version of the statute directly at issue here, the *only* pleading burden identified in the Act with respect to a due process hearing challenging an IEP was the burden on parents to file a complaint that gives adequate notice to the educational agency of the precise nature of the parents' objections to the IEP, including facts supporting those objections, and the parents' proposed resolution of the problem. See 20 U.S.C. 1415(b)(6) and (7).

The 2004 Amendments clarified or altered several important features of the administrative hearing, all of which reinforce the basic notice pleading design of proceedings.[7] First,

§ 52.550(e)(a) (2002); Del. Code Ann. tit. 14 § 3140 (1999); Minn. Stat. Ann. § 125A.091, subdiv. 16 (West 2004).

[7] Although the pre-2004 version of the IDEA is directly at issue here, the 2004 Amendments, effective July 1, 2005, clarify certain aspects of the IDEA due process hearing and reinforce that the burden—both before and after the 2004 Amendments—is on the complaining party, which here is petitioners.



the 2004 Amendments clarify that educational agencies, as well as parents, may file a complaint to initiate the administrative hearing. See 20 U.S.C. 1415(f)(1)(A); see also 20 U.S.C. 1415(b)(7)(A), 1415(c)(2); S. Rep. No. 185, 108th Cong., 2d Sess. 29 (2003) ("[L]ocal educational agencies, as well as parents, have the right to present complaints."). There are a number of circumstances in which the school would be the complaining party, such as where the parents object to having their child receive testing to determine whether the child has a disability and needs a special education, or where schools seek to change a child's placement due to a disciplinary issue. When a school files such a complaint, it is subject to the same notice pleading requirements as the parents. See 20 U.S.C. 1415(b)(7)(A)(ii)(I) and (II).

Second, the Amendments make clear that no party may have a "due process hearing" until it complies with the Act's pleading requirement, 20 U.S.C. 1415(b)(7)(B), and that the subject matter of the hearing is generally limited to issues raised in the complaint, 20 U.S.C. 1415(f)(3)(B). Thus, as with a civil complaint, a party's failure to raise issues in its administrative complaint under Section 1415 generally precludes the hearing officer from considering those issues.

Lastly, the Amendments require the school district—"if [it] has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint notice"—or other "non-complaining party" to file a written response to the complaint within 10 days of receiving the complaint. 20 U.S.C. 1415(c)(2)(B)(i) and (ii). In the response, the agency must explain why it "proposed or refused to take the action raised in the complaint"; describe "other options that the IEP Team considered and the reasons why those options were rejected"; describe "each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action"; and describe the "factors that are relevant to the agency's proposal or refusal." 20 U.S.C. 1415(c)(2)(B)(i)(I)(aa)-(dd). This is a burden of disclosure to account for the absence of discovery, or

at most production, which did not exist prior to the 2004 Amendments. Like the IDEA's other procedural requirements, it alleviates the concern that a school system has greater access to relevant information and greater control over the evidence by requiring the school system to give complaining parents full notice and descriptions of its evidence. Significantly, however, it does not require that the burden of *persuasion* fall on the school system. Nor does it require schools to establish the general appropriateness of an IEP or rebut possible objections not actually raised in the complaint. Instead, consistent with pleading practices in myriad civil and administrative proceedings in which the traditional allocation of the burden of proof applies, Congress chose to require schools to respond only to "the subject matter contained in the parent's due process complaint notice." 20 U.S.C. 1415(c)(2)(B)(i).

That the IDEA imposes a pleading regime similar to that applicable to civil and administrative litigation reinforces Congress's intent that the traditional allocation of the burden of proof should apply. As a leading treatise explains: "In most cases, the party who has the burden of pleading a fact will have the burdens of producing evidence and of persuading the jury of its existence as well. *The pleadings therefore provide the common guide for apportioning the burdens of proof.*" 2 John W. Strong, *McCormick on Evidence* § 337, at 411 (5th ed. 1999) (emphasis added); see, *e.g.*, 2 Charles F. Chamberlayne, *A Treatise on the Modern Law of Evidence* § 943 (1911) ("Whichever, of the parties, has the affirmative of the issue as determined by the pleadings, has the burden of proof, to establish his contention by the legally required preponderance of the evidence."). That Congress, as demonstrated by the 2004 Amendments, clearly envisioned that both parents and schools would initiate administrative hearings and imposed undifferentiated pleading requirements on the complainant reflect an intent to place the burden on the complainant. If Congress had intended schools to bear the burden of persuasion in all cases, regardless of which party filed the complaint, then it presumably would have said so explicitly and placed a burden on the school to demonstrate the overall appropriateness of its IEP.



2. Congress's emphasis on procedural safeguards, rather than substantive standards of review, likewise supports the view that Congress intended the traditional allocation of the burden of proof to apply to IDEA administrative hearings. As this Court observed in *School Committee of Burlington* v. *Department of Education*, 471 U.S. 359, 368 (1985), Congress recognized that in any disputes between the school officials and the parents over an IEP, "the school officials would have a natural advantage," and so "Congress incorporated an elaborate set of what it labeled 'procedural safeguards' to insure the full participation of the parents and proper resolution of substantive disagreements." These safeguards include, *inter alia*, the right to be members of the team that develops the IEP (20 U.S.C. 1414(d)(1)(B)); the right to "examine all records relating" to their child, to participate in meetings "with respect to the identification, evaluation, and educational placement of the child," and to obtain an independent educational evaluation of the child (20 U.S.C. 1415(b)(1)); the right to notice whenever the school district changes or refuses to change the child's educational placement (20 U.S.C. 1415(b)(3)); the right to "obtain assistance in understanding" the Act's provisions (20 U.S.C. 1415(c)(7)); the right to mediation (20 U.S.C. 1415(b)(5)); the right to initiate a due process hearing, at which they may be represented by counsel or a non-lawyer, and before which they must receive advance notice of the school system's evidence (20 U.S.C. 1415(f)(1) and (2)); and the right to file a civil action if aggrieved by the decision at the hearing (20 U.S.C. 1415(i)(2)). The fact that Congress omitted any special safeguard related to the burden of proof is strong evidence that none was intended. Cf. *Greenwich Collieries*, 512 U.S. at 280 (noting that Congress demonstrated "solicitude for benefits claimants" and "recognition that such claims * * * might be difficult to prove" through various presump-

tions but was silent on the burden of persuasion and APA's embrace of traditional rule that benefit claimant has burden of persuasion could not be overcome by silence).

That conclusion is confirmed by this Court's decision in *Rowley*, which reaffirms that Congress intended to achieve the goals of the IDEA primarily through the "elaborate and highly specific" procedural safeguards requiring notice and full participation by parents in the IEP process, rather than through mandating a particularly demanding or concrete substantive standard of review. 458 U.S. at 205-208. Thus, the Court concluded that Congress's "emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary [of Education] for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Id.* at 206. Just as Congress did not believe it necessary to detail "any substantive standard prescribing the level of education" that States must provide disabled children, *id.* at 189, it did not deem it necessary to prescribe any unique or demanding burden of proof that schools must meet in administrative proceedings in order to achieve the purposes of the Act.

The Court in *Rowley* further warned that "nothing in the Act * * * suggest[s] that merely because Congress was rather sketchy in establishing substantive requirements, as opposed to procedural requirements for preparation of an IEP, it intended that reviewing courts should have a free hand to impose substantive standards of review which cannot be derived from the Act itself." 458 U.S. at 206. That admonition is equally applicable here. Petitioner's proposed allocation of the burden of proof is precisely the kind of "substantive standard[] of review which cannot be derived from the Act itself" that this Court referenced in *Rowley*. See, *e.g.*, *Greenwich Collieries*, 512 U.S. at 271 (concluding that allocation of burden of proof is "a rule of substantive law"



inherently intertwined with substantive standard of review); *Raleigh* v. *Department of Revenue*, 530 U.S. 15, 20-21 (2000).

3. Unless a parent objects to a proposed IEP, the IDEA allows the IEP to go into effect. 20 U.S.C. 1415(b)(6) and (7). If a parent initiates a due process hearing to challenge the IEP or seek relief, the Act's so-called "stay put" provisions state that, with certain limited exceptions, unless the school and the parents otherwise agree, "the child shall remain in the then-current educational placement of such child" until the administrative hearing has been completed. 20 U.S.C. 1415(j) and (k).

The fact that the IEP goes into effect absent a decision by the parents to initiate a challenge makes clear that the parents, in such cases, are the party seeking relief who would presumptively bear the burden of proof. The "stay put" provision's automatic stay provision does not alter that fact. Indeed, the stay put provision reinforces the conclusion that the party initiating the hearing bears the burden of proof in two ways. First, Congress could have created a presumption in favor of the parent's preferred option pending the due process hearing, rather than a preference in favor of preserving the status quo. Indeed, if Congress did not assume that school officials would faithfully comply with the Act's substantive requirements, it presumably would have done so.

Second, in the pre-amendment version of Section 1415(k)(2)(A), Congress did in fact place a narrow burden of persuasion on the educational agency when seeking to alter the status quo, thereby demonstrating in the IDEA itself that Congress knows how to place the burden of proof on the school district when it deems it appropriate. That Section, not implicated here, states that a hearing officer may order a change in placement for a disabled child to "an appropriate interim alternative educational setting for not more than 45 days if the hearing officer determines that the public agency *has demonstrated by substantial evidence* that maintaining the current placement of such child is substantially likely to result in injury to the child or to others." 20 U.S.C.

1415(k)(2)(A) (emphasis added). Its presence suggests that the lack of similar language placing the burden of persuasion on the school generally in IDEA administrative hearings was not the product of mistake or inattention, but rather an indication that Congress presumed the traditional allocation of the burden of proof would apply.[8]

4. Other provisions of the Act, as amended in 2004, support the traditional allocation of the burden of proof. One of Congress's primary aims with the 2004 Amendments was to reduce the amount of litigation and promote cooperation with respect to the adoption and implementation of IEPs. See H.R. Rep. No. 77, 108th Cong., 1st Sess. 85 (2003) (noting amendments were designed to "[r]estor[e] trust and reduc[e] litigation" concerning IEPs). Specifically, the Amendments strengthen the notice requirements for due process complaints, 20 U.S.C. 1415(b)(7)(A), establish a two-year statute of limitations for such complaints, 20 U.S.C. 1415(b)(6)(B), encourage the use of voluntary mediation, 20 U.S.C. 1415(e), and authorize the award of attorney's fees to the school district if a parent's complaint is frivolous or was filed for an improper purpose, 20 U.S.C. 1415(i)(3)(B). See H.R. Rep. No. 77, *supra*, at 85-86.

In making those changes, Congress sought to alleviate the burdens imposed on school districts by "excessive litigation under the Act," and "align the Act" with other federal statutes such as those authorizing "civil rights claims, Federal tort claims, [and] Social Security." H.R. Rep. No. 77, *supra*, at 116. Those goals would be undermined rather than served by imposing a non-textual burden of persuasion on schools that amounts to a presumption of invalidity of actions by

[8] In 2004, Congress eliminated this express, but limited, burden of proof on the school system. The relevant section as amended provides that a hearing officer may order the change in placement "if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or others." 20 U.S.C. 1415(k)(3)(B)(ii)(II).



public officials that is foreign to analogous civil and administrative proceedings.

### D. Petitioners' Arguments That Considerations Of Policy And Fairness Require Placing The Burden Of Persuasion At All Times On The School Are Mistaken

Petitioners advance several policy arguments as to why the school district should bear the burden of proof in administrative proceedings in which the parents challenge the school's proposed IEP. None of those arguments is persuasive.

1. Petitioners suggest (Br. 22-28) that, by using the term "due process" to describe administrative hearings under the IDEA, Congress required that the school district bear the burden of proof. That contention is unavailing. Petitioners did not raise (and therefore waived) this argument in the courts below, and seemingly with good reason; nothing in the Due Process Clause requires the school to bear the burden of proof.

Far from supporting petitioners' argument, *Mathews* v. *Eldridge*, 424 U.S. 319, 335-348 (1976), on which petitioners rely, held that existing administrative procedures were constitutionally adequate and that the additional "procedural safeguard" of an evidentiary hearing was not required before the termination of disability benefits under the Social Security Act. In fact, the Court in *Mathews* noted that, to establish entitlement to disability benefits, a worker "*bears a continuing burden of showing*" that he suffers from a sufficiently severe disability to entitle him to benefits. *Id.* at 336 (emphasis added).

Shortly after *Mathews* was decided, moreover, this Court in *Lavine* v. *Milne*, 424 U.S. 577 (1976), unanimously rejected a due process challenge to a state law that placed the burden of proof on individuals claiming that they had been erroneously denied welfare benefits. The Court held that "[o]utside the criminal law area, where special concerns at-

tend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Id.* at 585. Indeed, the Court in *Milne* appears to have viewed the allocation of the burden of proof as a substantive choice for the State and did not even apply the *Mathews* analysis. See *id.* at 587 ("[E]ven assuming, *arguendo*, that the burden of [the challenged provision] on the industrious indigent far outweighs any conceivable gain to the State from screening out the indolent few, New York nevertheless prefers its chosen course; and it is not for this Court to assay the wisdom of that determination."). By not only providing parents with a "due process" administrative hearing in which to challenge an IEP, but also providing extensive procedural safeguards both before, during and after such a hearing, Congress has more than satisfied any procedural due process requirements in the IDEA.[9]

2. Petitioners are also mistaken in their claim (Br. 29, 39-50) that a special allocation of the burden of proof is required because school districts have an unfair advantage over parents with regard to control over evidence and access to witnesses. This Court in both *Rowley* and *School Committee of Burlington* held that Congress has already addressed policy concerns, such as the potential disparities between the par-

[9] Petitioners point (Br. 43) to lower court decisions holding that, in the context of the five-step process that the Commissioner of Social Security uses "to determine whether a claimant has met the burden of proving his disability," the burden of proof shifts to the Commissioner at step five to show that there are jobs in the national economy that a claimant could perform. See *Doughty* v. *Apfel*, 245 F.3d 1274, 1278 (11th Cir. 2001). As this Court noted in *Bowen* v. *Yuckert*, 482 U.S. 137, 146 & n.5 (1987), however, that five-step process, including any burden born by the Commissioner in step five, is carefully controlled by regulation pursuant to the agency's "exceptionally broad authority to prescribe standards for applying certain sections of the Act." The Court emphasized, moreover, that the regulation in question generally "does not change the settled allocation of burdens of proof in disability proceedings," which the Court noted was on the benefits claimant. *Ibid.* In any event, there is no comparable requirement in the individualized inquiry into whether a proposed IEP provides a particular child with a free appropriate public education.



ties, through the IDEA's *procedural* safeguards and that it would be inappropriate to impose a substantive standard of review not found in the Act for such reasons. See *Rowley*, 458 U.S. at 206-207; *School Comm. of Burlington*, 471 U.S. at 368. Cf. *Greenwich Collieries*, 512 U.S. at 280 (Congress can address difficulties of proof through means other than shifting burden of persuasion). Those procedural devices, moreover, affect the balance in every case, not just the relatively rare case where the evidence is in equipoise.

Petitioners' arguments are also inconsistent with the pleading regime mandated by Congress, which places substantial burdens on parents to file a complaint detailing the precise nature of their objections to the IEP, including facts supporting those objections, and their proposed resolution of their complaint. 20 U.S.C. 1415(b)(7). Congress also mandated that the hearing itself shall be limited to the issues raised in the complaint, 20 U.S.C. 1415(f)(3)(B) (effective July 1, 2005), and it limited the school's obligation to respond to those same issues, 20 U.S.C. 1415(c)(2)(B) (effective July 1, 2005). Clearly, Congress thought that the procedural safeguards contained in the Act provided a sufficiently level playing field to make it fair to impose such substantial requirements on parents. There is no reason to believe that Congress reached any other conclusion with regard to the allocation of the burden of proof. See Pet. App. 11-12 (holding that in light of IDEA's procedural safeguards, "school system has no unfair information or resource advantage that compels us to reassign the burden of proof"). That conclusion is further buttressed by the fact that Congress expressly granted parents and schools equal rights to the safeguards applicable to the due process hearing. See 20 U.S.C. 1415(h).

3. Petitioners also contend (Br. 30-34) that placing the burden of proof on the school district would further Congress's remedial intent in enacting the IDEA. This argument, however, would apply equally to any other remedial or benefit-conferring statute. But as the court of appeals ob-

served, statutes such as Title VII, the ADA, the Rehabilitation Act, and the ADEA are remedial in nature and silent as to the burden of proof, "yet we assign it to the plaintiff who seeks the statutory protection or benefit; the burden is not assigned to the party with the statutory obligation." Pet. App. 8-9. Applicants for government benefits also generally bear the burden of proof to establish eligibility for benefits. See, *e.g.*, *Milne*, 424 U.S. at 582-583 ("as is the case when applying for most governmental benefits, applicants * * * bear the burden of showing their eligibility in all respects").

4. Petitioners further attempt to distinguish the IDEA on the ground that it does not merely prohibit schools from discriminating, but imposes an affirmative duty to provide a free appropriate public education to each disabled child. See Pet. App. 18 (Luttig, J., dissenting). But other federal antidiscrimination statutes also impose "affirmative" obligations.

Title VII's prohibition on discrimination on the basis of religion, for example, includes an affirmative duty to provide a reasonable accommodation of an employee's religious practice unless it would create an undue hardship. *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 63 & n.1 (1986); 42 U.S.C. 2000e(j). Similarly, under the ADA and the Rehabilitation Act, if an employee shows that he is an "otherwise qualified individual with a disability," who can "perform the essential functions of the job" with reasonable accommodation, the employer has "an affirmative obligation to make a reasonable accommodation" for the employee absent a showing of "undue hardship." 42 U.S.C. 12112(b)(5)(A) (ADA); see *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 289 n.19 (1987) (Rehabilitation Act). And, under the Family and Medical Leave Act (FMLA), the employer has an affirmative obligation to grant employees twelve weeks of unpaid leave per year to care for a newborn infant or adopted or foster child, to care for a parent, child, or spouse with a serious health condition, or because of the employee's own serious health condition. 29 U.S.C. 2612(a)(1)(A)-(D).



Nor can petitioners distinguish the ADA on the ground that it applies to a broad spectrum of businesses, whereas the IDEA applies only to public schools. See Pet. Br. 32. While true as to the ADA, Section 504 of the Rehabilitation Act, like the IDEA, applies only to recipients of federal funds. In any event, this distinction is unrelated to which party should bear the burden of proof. If anything, the fact that public schools have limited funds and a mission to educate all children, disabled and non- disabled, makes it more, not less, important to provide state and local educators with sufficient flexibility to achieve the requirements of the IDEA and, at the same time, to fulfill their mission with respect to all children.

5. Petitioners further seek to distinguish the IDEA on the ground that it requires a school to seek out children that require special education and to engage in a formal collaborative process with parents. Pet. Br. 32. But those differences do not justify shifting the burden of proof to the schools in every case (indeed, the IDEA's emphasis on collaboration suggests that the schools do not possess a monopoly on the relevant information). Nor does petitioners' argument validly distinguish the present case from other cases in which a plaintiff challenges government action. And whatever else might be said about administrative complaints challenging an IEP, they necessarily allege that public officials failed to comply with their legal obligations. In this critical respect, they are indistinguishable from complaints challenging government conduct under analogous statutes.

In addition, courts have held under the Rehabilitation Act and the ADA that an employer has an affirmative duty, at least where the employee can be reasonably accommodated, to "engage in an interactive process" with the employee to identify an appropriate reasonable accommodation. *Beck* v. *University of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996); see, *e.g.*, *Mays* v. *Principi*, 301 F.3d 866, 870-871 (7th Cir. 2002) (Rehabilitation Act); *Peebles* v. *Potter*, 354 F.3d 761, 769 (8th Cir. 2004) (refers to "interactive process

required" under Rehabilitation Act). The employer's duty to participate in an interactive process with employees with respect to reasonable accommodations under the Rehabilitation Act thus belies petitioners' purported distinction.

6. Petitioners further contend (Br. 34-38) that the school system should bear the burden of proof because the consequences of an erroneous decision would have a more serious adverse impact on a disabled child than on a school system. But this argument could be made in virtually any proceeding where an individual challenges government action, since the government always has greater resources than any given individual. Individuals challenging the denial of benefits, or the termination of their employment can also suffer dire consequences in the event of an erroneous denial, but that does not change the well-settled burden of proof in the context of anti-discrimination statutes and statutes that provide welfare or disability benefits. Indeed, as the APA default rule regarding burden of proof demonstrates, Congress found it appropriate for the benefit claimant generally to bear the burden of proof.

## CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted.

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